

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

5:07CV38-1-V

5:05CR9-13-V

ANTHONY McCLELLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

)
)
)
)
)
)
)
)
)
)

ORDER

THIS MATTER comes before the Court upon Respondent's Motion to Reconsider, filed May 10, 2007.

On March 29, 2007, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence alleging, among other things, that his counsel was ineffective for failing to file a notice of appeal when he had been requested to do so. In accordance with this Court's practices, the Court granted Petitioner's ineffective assistance of counsel claim based upon his counsel's alleged failure to file an appeal when requested to do so and dismissed without prejudice the remainder of Petitioner's Motion to Vacate. To allow the Petitioner to appeal, this Court also ordered that the original criminal judgment be vacated and directed the Clerk to enter a new judgment from which an appeal could be taken. This case is presently on appeal to the Fourth Circuit.

Respondent has filed a Motion to Reconsider attaching a waiver form signed by Petitioner less than ten days after the entry of Judgment in his criminal case in which he

indicates that he had been advised of his right to appeal; the time period within which he must file a notice of appeal; and his counsel's belief he had no meritorious issues for appeal and that he decided not to file an appeal. The existence of a contemporaneous waiver signed by Petitioner provides ample basis for this Court to reconsider its earlier ruling. However, since this matter is now pending on appeal to the Fourth Circuit Court of Appeals, this Court will decline to rule on Respondent's motion and defer the hearing thereof until such time as a remand might take place._

THEREFORE, IT IS HEREBY ORDERED that:

1. Respondent's Motion to Reconsider is hereby held in abeyance as potentially moot; and
2. A copy of Respondent's Motion, with attachment, and a copy of this Order shall be transmitted by the Clerk to the Clerk of the Fourth Circuit Court of Appeals.

Signed: May 21, 2007

A handwritten signature in black ink, reading "Richard L. Voorhees". The signature is fluid and cursive, written over a horizontal line.

Richard L. Voorhees
United States District Judge

